1940

Adolph Coors Company v. Liquor Control Commission of Utah, J. W. Funk, Herbert C. Taylor and Henry Jorgensen as Commissioners of the Liquor Control Commission of the State of Utah : Brief of Plaintiff in Support of Its Application for Writ of Prohibition

Utah Supreme Court

Ira A. Huggins; Paul H. Ray; Attorneys for Plaintiff; D. Howe Moffat; Attorney for Defendants;

6245

IN THE

SUPREME COURT

OF THE

State of Utah

May Term 1940

ADOLPH COORS COMPANY, a Corporation,

Plaintiff,

vs.

LIQUOR CONTROL COMMISSION OF UTAH, J. W. FUNK, HERBERT C. TAYLOR and HENRY JORGENSEN AS COMMISSIONERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF UTAH,

Defendants,

No. 6245

PLAINTIFF'S BRIEF IN SUPPORT OF ITS APPLICATION FOR WRIT OF PROHIBITION

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ALPHABETICAL INDEX OF CASES

Atwood v. Cox, 55 Pac. (2d) 377 92 Ut. 149 11
Booth v. Midvale City 55 Ut. 220-184 Pac. 799 14
Barnes v. Lehi City et al. 74 Utah 321, 279 Pac. 878 9
Bird & Jex Co. v. Funk, 85 P. (2) 831 ..... 30, 33, 35
Cottrell v. Millard County Drainage District. 58 Ut. 375,
199 Pac. 166 15
Hartley v. State Road Com. et al. 53 Ut. 589, 174 Pac. 639 14
Keyser v. Erickson, 61 Utah 179, 211 Pac. 698 23
Liquor Control Act Section 96 27
Laws of Utah 1935 Sec. 29, Chapter 43 34
Laws of Utah 1937 Chapter 50, Sec. 103-104 ..... 35, 34
Laws of Utah 1937 Chapter 49 34
Liquor Control Act Section 83 31
Liquor Control Act Article No. 5 31
Liquor Control Act Section No. 3 ..... 31, 32
Liquor Control Act Section No. 6 ..... 26, 32
Liquor Control Act Section No. 7 29
Liquor Control Act Section No. 2 30
Liquor Control Act Section No. 89 34
Livingston v. Millard County Drainage District No. 3,
58 Ut. 382, 199 Pac. 661 15
McGrew v. Industrial Commission, 96 Utah 203, 85 P. (2) 608 15
Moyle v. Board of Commissioners of Salt Lake County
et al., 53 Ut. 352, 174 Pac. 198 13
Oldroyd v. McCrea, 65 Utah 142, 235 P. 580, 40 A. L. R. 230 11
People ex rel. Harris v. Hinckle,
Secretary of State 227 P. 861 ..... 8, 28
Paramor Theatre Co. v. Fair Trades Commission
of the State of Utah, 95 Utah 354, 81 P. (2d) 639 16
Regulation No. 20 — 1933 23
Revised Statutes of Utah Sec. 20-2-2 2
Regulation No. 20 sub-paragraph (b) 22
Re Rice Petitioner, 155 U.S. 402, 155, S. Ct. 152, 39 L. ed. 198 10
State ex rel. Patterson v. Lee, 164 So. 188 (Fla. 1935) 7
State ex rel. Public Service Commission v.
Southern Pacific Co. et al., 95 Utah 84, 79 P. (2d) 25 16
Tite v. Tax Commission, 89 Utah 404, 57 P. (2d) 734 ..... 16, 35
Terrace v. Thompson, 68 L. ed. 255, 263 U.S. 197 17
Utah Association of Credit Men v.
Bowman, Judge, et al., 38 Utah 326, 113 Pac. 63 5
Van Orton v. Board of Education of Cache County
School District 56 Utah 430 191 Pac. 230 14

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PLAINTIFF'S BRIEF

This proceeding calls into question the powers of the Liquor Control Commission and is of state-wide importance. The rights of the plaintiff are admittedly substantial and the damage it has and will suffer is substantial and incalculable.

It is prayed that this Court, consistent with its previous practice in similar cases, assume jurisdiction of

the matter and determine and declare the rights of the parties hereto.

There is no doubt that the Supreme Court has power to issue the writ of prohibition which is requested by this proceeding. Section 20-2-2 R. S. U. 1933 provides:

> "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus."

Part 1. THIS COURT SHOULD ASSUME ORIGINAL JURISDICTION OF THIS CAUSE:

Pursuant to a request of this Court we will address ourselves to the question whether the Court should exercise its discretion for or against assumption of jurisdiction or remit the plaintiff to its remedy in the first instance to one or more district courts.

This Court has many times assumed jurisdiction in similar cases in order to afford interested parties that plain, adequate and speedy remedy which the law contemplates. This case is one in which plaintiff's damage accumulates constantly by the passage of time and for which there can be no recovery. It is urged, therefore, that to remit plaintiff to its remedy before the district courts will deprive it of the type of relief to which it is fairly entitled.

It is significant that most if not all of the cases involving a writ of prohibition in the State of Utah deal with original applications for the writ in this court. Applications for the writ have been and will no doubt

be relatively infrequent although much of the legislation creating administrative boards with quasi jurisdictional powers provides for a writ of review from this Court. Such is the case, for example, in the Workmen's Compensation Act and in the laws relating to the Public Service Commission. Procedure for remedy and review is also contained in the Unemployment Compensation Act. There is, however, no appeal provided by law from the decisions of the State Liquor Commission. The Commission is a part of the executive function of the State, and neither the Commission, nor its members, in the absence of fraud, would be liable for damages inflicted by the enforcement of an order even though the order be invalid and in excess of jurisdiction. We recognize the rule that this court has the right and the power to determine its own jurisdiction and would not be required in the exercise of a sound discretion to take jurisdiction of all applications for writs of prohibition if, in the opnion of the Court, a plain, speedy and adequate remedy would be afforded by requiring the applicant for the writ to pursue his remedy in the District Court. But it appears obvious from an examination of the facts and circumstances at bar that an application for a writ of prohibition or injunction in the district court would not afford the applicant speedy and adequate relief.

It clarifies the question under present discussion to divorce it from the merits of the case for the moment and assume that the plaintiff is being deprived arbitrar-

ily and capriciously and under a void order of its right to transport and sell beer in Utah in eight ounce bottles.

This is a valuable property right, the destruction of which can only be averted by action of this Court. When and if the order is finally held to be in excess of the jurisdiction of the Commission the applicant will have no remedy under which to recover the damages which it will have sustained. Therefore, the remedy to be adequate must be speedy. The situation presented requires a final determination of the validity of the order at the earliest possible date. It would be unfair and unjust to require the plaintiff to proceed by an application for an injunction in the district court. If a preliminary restraining order were issued such would require of the applicant the putting up a bond even if the district court should decide that it could restrain the enforcement of the order pendente lite, with the consequent hazard of suits on such a bond by parties who might claim to have been damaged by the non-compliance with the order.

Brewers in Utah who are distributing beer in bottles of the capacity permitted under the order of the Commission would probably claim damages by reason of the sale of beer in eight ounce bottles if it should be finally determined that the order of the Commission were valid. This would result in a multiplicity of suits for damage and would be a hazard which no litigan

should be forced to assume where another speedy and adequate remedy is available. The proceeding in a district court would involve the delay of an appeal to the Supreme Court before the question could be finally determined. Apparently there is nothing in the law which would prevent the bringing of suits for the determination of the validity of the order in different district courts of the State at the same time, whose opinions might conflict, thereby making confusion more confused until the final determination by this court.

A district court might well be reluctant to condemn a regulation of the Commission in the absence of some controlling or guiding announcement from this Court, in which event it would pass the responsibility up to this Court. This plaintiff and all others similarly interested would then find themselves, after the long delay of intermediate litigation, exactly where they are at the moment. If it should then be ruled that the order complained of is invalid the losses suffered by plaintiff, for which it has no recourse, would be to the extent of the delay irretrievably increased.

The law gives to the district courts no special supervisory power over the Commission. Assumption by this Court of jurisdiction in this matter would be consistent and in harmony with the procedure now well established by which this Court reviews the acts and orders of practically all other administrative bodies.

In **Utah Association of Credit Men v. Bowman**

Judge, et al., 38 Utah 326, 113 Pac. 63, this Court took original jurisdiction of an application for writ of mandamus against J. M. Bowman, Judge of the civil division of the city court of Salt Lake City, and against B. S. Rives, ex-officio clerk of such court, to compel entry of a default judgment by the clerk. The judge of the city court had ordered the clerk to refuse to enter a default judgment on the ground that the statute providing for such default judgment was unconstitutional. This court held that the clerk was performing a ministerial act in entering a default judgment and that mandamus was the proper remedy and granted the writ.

> "The Clerk, therefore, wrongfully refused to perform a legal duty and the Judge wrongfully or illegally refused to require the Clerk to perform such duty. In view, therefore, that the Judge has refused to compel the Clerk to act we must now do what the Judge ought to have done. It is therefore ordered that a peremptory writ of mandate issue against the Clerk requiring him to enter judgment as prayed for in plaintiff's complaint filed in the action to which reference has been made in this opinion." (Page 339 of 38 Utah).

In that case the district court had concurrent jurisdiction with this Court to issue the writ of mandamus. However, this court recognized that the question involved was one of public concern and interest which required speedy and final determination in order to afford the applicant an adequate remedy and in order to

establish a speedy clarification of the duties of the clerk of the city court.

An interesting question and decision in point is reported in **State ex rel. Patterson v. Lee,** 164 So. 188 (Florida 1935). Florida had passed an act to license certain types of coin operative devices and providing for the division and distribution of the revenue derived therefrom. The act was administered by the defendant Lee as comptroller of the State of Florida. Prior to the filing of the application for writ of mandamus in the Supreme Court of Florida the circuit court in and for Dade County issued its injunction and restraining order restraining the defendant Lee from enforcing and administering any of the powers, duties or privileges under the act in question. The injunction in the circuit court was apparently based on the contention that the operation of a slot machine constituted a lottery. The defendant in the mandamus proceeding in the Supreme Court of Florida filed his answer setting up the injunction of the circuit court of Dade County as justification for a failure to enforce the act. The Supreme Court of Florida held that the circuit court for Dade County did not have jurisdiction of the defendant comptroller because his duties were to be performed at the capitol of the state located in Leon County. The following quotation from the case illustrates the point that the confusion which would result if the applicant in the case at bar were required to seek an injunction in the district

courts of the State of Utah against the enforcement of an order of the Liquor Control Commission is a real and practical difficulty preventing such remedy from being adequate:

> "That suits instituted in the circuit courts to control or coerce the comptroller in the exercise of his administrative duties which are to be performed at the capitol of the state must be limited to the circuit court in and for Leon County in the second judicial circuit of Florida is necessary; otherwise numerous suits could be instituted throughout the state of Florida in different circuits involving the same questions and different results and judgments conflicting in operation could be had against him at one and the same time in the several different judicial circuits of the state. This would bring about the possibilitiy of such confusion as to make it impossible for the comptroller to obey the mandate of one circuit court without violating that of another and would place him in position where it would be impractical to perform his official duties without appearing to be in contempt of the orders of one or more circuit courts.
>
> "For the reasons stated, the peremptory writ will be awarded."

In the State of Washington, as in Utah, the law provides that both the Supreme Court and the Superior Courts have jurisdiction to grant writs of mandamus and prohibition. In **People ex rel. Harris v. Hinckle,**

Secretary of State, 227 Pac. 861, the Supreme Court took original jurisdiction and issued its writ of mandate to prevent the Secretary of State from permitting the withdrawal of signatures on initiative petitions which had been filed and was known as the so-called "School Bill." The court said:

> "We have never refused jurisdiction in a case where a judicial officer or tribunal was attempting to exercise unlawful judicial acts, and it makes no difference what sort of officer or tribunal is attempting to exercise such power." * * * *
>
> "We are therefore of the opinion that under the constitutional provisions conferring original jurisdiction upon this court to issue such writ, or at common law, the writ of prohibition would lie against this state officer to prevent such usurpation of power and unlawful exercise of a quasi judicial function."

In **Barnes v. Lehi City et al.,** 74 Utah 321, 279 Pac. 878, this court took original jurisdiction of an application for prohibition against Lehi City, its mayor and councilmen, to prevent them from entering into a conditional sales contract with Fairbanks, Morse & Co. for the purchase and installation of a certain electrical generating unit with its accessories. The writ was denied on the merits. The court discusses the question whether the writ provided by our constitution and statutes is the writ known to the common law:

> "The true office and function of which is to

prevent an inferior tribunal, board or individual from exercising judicial or quasi judicial functions without quasi jurisdiction or whether it has been enlarged by our statutes to authorize the probitition of executive or ministerial acts without or in excess of jurisdiction."

The court reviews Utah statutes and cases and holds that the writ provided by our statute authorizes the prohibition of acts in excess of power or jurisdiction whether judicial or ministerial. It was contended that the Supreme Court should not grant the application for the writ of prohibition because plaintiffs had a plain, speedy and adequate remedy by injunction. Upon this question the court said:

"As a general rule prohibition will not lie where the applicant has any other plain, speedy, and adequate remedy in the ordinary course of law. When there is another remedy the writ is not demandable as a matter of right. The writ may, however, be issued in the exercise of a sound judicial discretion. The law on the subject, as now understood, was stated by the Supreme Court of the United States in Re Rice, Petitioner, 155 U. S. at page 402, 15 S. Ct. 152, 39 L. Ed. 198, as follows:

"'Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other

> remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary."

The rule there announced was approved by this court in **Oldroyd v. McCrea,** 65 Utah 142, 235 P. 580, 40 A. L. R. 230.

> "We recognize the importance of placing reasonable restrictions upon the use of the writ of prohibition, and have no desire to encourage the practice of invoking the original jurisdiction of this court by resorting to these extraordinary remedies. This court has, however, in a great many of the cases cited by plaintiffs, entertained applications for writs in situations similar to the situation here involved. We think that the facts and circumstances of this case justify us in entertaining plaintiff's application for the writ."

The case of **Atwood v. Cox,** 55 Pac. (2d) 377, 92 Utah 149, decided by this court in 1936, contains an exhaustive and penetrating analysis of the difficult question of when the action of an inferior tribunal is in excess of its jurisdiction so as to justify a writ of prohibition and when such action is merely erroneous leaving

the aggrieved party to his remedy by the ordinary processes of appeal.

> "In certain situations where it would work a palpable injustice or hardship or because damage which could not be checked or remedied in any other way, the Superior Court will not go too refinedly into the question as to what constitutes error merely or lack or excess of jurisdiction before issuing the writ. * * *
>
> "In a number of jurisdictions where a threatened interlocutory or intermediate order involving some affirmative action of the lower court in reference to property, status, relationship, or rights of parties in respect to property was of such a nature as to destroy the status quo and render an appeal or other remedy ineffectual to undo the mischief, the courts have issued the writ of prohibition as a 'fill-in' in order to prevent threatened mischief; most times not giving reasons therefore except to say categorically that the court below was threatening to exceed its jurisdiction or judicial powers or proceeding unlawfully or without legal warrant."

Certainly any remedy which the applicant herein might have pursued in the district court to be effective would have destroyed the status quo with reference to the order of the Liquor Commission and an appeal would have been ineffectual to undo the mischief or to prevent threatened mischief.

It is significant to observe that this court in the

cases to be shortly discussed has taken jurisdiction of applications for writs of prohibition and has decided the question involved on the merits where the defendants were public tribunals or political sub-divisions of the State of Utah without discussing or considering the propriety of exercising such jurisdiction. The situations presented to the court in these cases, which are similar to the question involved in the case at bar, obviously called for the exercise of the original jurisdiction of this court to afford a plain, speedy and adequate remedy. The fact that the same relief could have been requested from the district courts was apparently not considered by any of the attorneys in these cases or by the court itself as creating any question worthy of discussion upon the propriety of this court assuming and exercising its concurrent original jurisdiction.

Moyle vs. Board of Commissioners of Salt Lake County, et al, 53 Utah 352, 174 Pac. 198 was an application filed in the Supreme Court for writ of prohibition against the Board of County Commissioners of Salt Lake County and the individual members thereof to prohibit them from holding a special election which had been called for the purpose of submitting to the qualified voters of said county the proposition whether certain bonds should be issued and the proceeds thereof devoted to the construction of certain specified public roads in said county. An alternative writ was issued and the defendants appeared and filed what was in legal effect a gen-

eral demurrer. The court considered the application on its merits and denied the writ.

Hartley vs. State Road Commission, et al, 53 Utah, 589, 174 Pac. 639 was an original proceeding in prohibition against the State Road Commission and Simon Bamberger and others as members thereof. The attorney general filed a general demurrer, and the court held on the merits that the defendants had not exceeded their authority when they authorized the use of $50,000.00 derived from certain bonds to be used on roads in Davis County. The court assumes, without discussion, the propriety of its exercise of original jurisdiction upon the application for prohibition.

Booth vs. Midvale City, 55 Utah 220, 184 Pac. 799, was an application to the Supreme Court for a writ of prohibition against Midvale City and another to restrain the city from entering into a contract with the county for paving certain streets within the limits of the city. The application is considered on its merits and denied without the point being raised or discussed that there was any question about the propriety of the Supreme Court exercising its original jurisdiction.

Van Orton vs. Board of Education of Cache County School District, 56 Utah 430, 191 Pac. 230, was an original application for a writ of prohibition against the Board of Education of Cache County School District and others to prohibit them from issuing and selling bonds voted at a special bond election held in said District Feb-

ruary 17, 1920. The case was considered on its merits and the application for writ of prohibition was denied.

Cottrell vs. Millard County Drainage District, 58 Utah 375, 199 Pac. 166, was an original proceeding in the Supreme Court against the Millard County Drainage District and others seeking to prohibit the defendants from offering for sale or selling certain bonds of the District in the sum of $150,000.00. The case was considered on its merits and the petition dismissed.

Livingston vs. Millard County Drainage District No. 3, 58 Utah 382, 199 Pac. 661, was an original application for a writ of prohibition to prohibit the defendants from delivering certain drainage district bonds and from complying with the terms of a certain agreement entered into between the district and a contractor. The application was considered on its merits and the peremptory writ of prohibition issued.

In **McGrew v. Industrial Commission,** 96 Utah 203, 85 P. (2d) 608, this court assumed original jurisdiction to test the validity of Mandatory Order No. 1 of the Industrial Commission fixing minimum wages and hours and condition of employment for women and minors in the retail trade. There, as here, it might have been asserted that inasmuch as the district courts had concurrent jurisdiction with this court the parties should be remitted to the inferior court in the first instance. But the power of an administrative body exercising statewide authority was involved and this court, recognizing

the necessity of quickly determining and declaring the extent and limitations upon such power, assumed jurisdiction and settled the matter without the necessity for the delay which would have attended intermediate litigation in the district courts.

Likewise **State ex rel. Public Service Commission v. Southern Pacifi cCompany, et al.,** 95 Utah 84, 79 P. (2d) 25, this court exercised its original jurisdiction to consider an application of the State for a writ of mandamus to require the defendants and others to file statements with the Public Service Commission in accordance with the dictates of certain acts of the legislature commonly known as the Maw Bills. The powers and jurisdiction of the Public Service Commission were brought in issue and this court did not hesitate to take jurisdiction and determine without delay the rights of the parties.

So in **Paramor Theatre Company v. Fair Trades Commission of the State of Utah,** 95 Utah 354, 81 P. (2d) 639, this court, appreciating the desirability of quickly construing, determing and declaring the rights of the Commission involved and the public affected, took jurisdiction and settled the question presented.

In **Tite v. Tax Commission,** 89 Utah 404, 57 P. (2d) 734, the Tax Commission had assessed a fine against a merchant of Ogden for violation of certain statutory provisions requiring the affixing of revenue stamps to packages containing cigarettes. The merchant, feeling

aggrieved nd challenging the power of the Tax Commission to assess a fine in such cases and being unwilling to run the risk of delay in having his rights in the matter settled and determined, sought relief from this court by an application for writ of prohibition. Jurisdiction was assumed by this court and in accordance with its practice in such cases it disposed of the matter and settled the rights of the administrative board involved without remitting the parties to such rights as they might have had in the district court.

The foregoing cases reflect a well established practice on the part of this court in cases involving the powers of administrative boards to exercise the original jurisdiction vested in it and give quick relief in the form of determinations and adjudications of powers sought to be exercised.

Terrace v. Thompson, 68 L. Ed. 255, 263 U. S. 197, contains a scholarly exposition of the principles here under discussion. While the precise question whether the Supreme Court should exercise its original jurisdiction, was not involved nevertheless the decision is particularly applicable to certain aspects of the problem now facing us. The case arose in the State of Washington and tested the validity of an alien ownership statute of that state. A Washington landowner desired to lease his land to an alien who was denied the right by statute to own any interest in land. If a lease were made both parties thereto violated the statute. The state threatened

prosecution of both parties if the agreement were entered upon. The landowner sought relief in equity and the Supreme Court held it was a proper case for the intervention of a court of equity. In speaking upon the subject the court said, in part:

> "The unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical, and efficient as that which equity could afford. Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, 281, 53 L, ed. 769, 798, 29 Sup. Ct. Rep. 426; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 11, 12, 43 L. ed. 341, 346, 347, 19 Sup. Ct. Rep. 77. Equity jurisdiction will be excercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity. Citing cases.
>
> "The Terraces' property rights in the land in-

clude the right to use, lease, and dispose of it for lawful purposes (Buchanan v. Warley, 245 U. S. 60, 74, 62 L. ed. 149, 160, L. R. A. 1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918A, 1201), and the Constitution protects these essential attributes of property (Holden v. Hardy, 169 U. S. 366, 391, 42 I. ed. 780, 790, 18 Sup. Ct. Rep. 383), and also protects Nekatsuka in his right to earn a livelihood by following the ordinary occupations of life (Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625). If, as claimed, the state act is repugant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient, or adequate as the remedy in equity. And assuming, as suggested by the atttorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against

them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment, and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly, Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a landowner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the attorney general to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. Traux v. Raich, 239 U. S. 33, 37, 39, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution."

And so here it would be asking more than the law

required to demand that plaintiff, instead of invoking the power of this court, run the risk of criminal prosecution which would attend violation of the regulation complained of. However strong one may be in his conviction that a law or regulation is invalid he should not be required to hazard the results of prosecution as long as a speedy and adequate remedy is available. And if plaintiff had itself been willing to violate the regulation and rely upon the invalidity of regulation as a defense to prosecution it could not have possibly made such defense for all purchasers of beer in violation of the regulation who would have been guilty equally with plaintiff.

The foregoing makes it clear that this is a case in which this court should exercise its original jurisdiction in order that plaintiff may not be denied the plain, speedy and adequate remedy to which it is entitled. A discussion and consideration of the case upon its merits will conclusively confirm the case as one for the intervention of this court's original jurisdiction.

Assuming that the court will take jurisdiction, we will present the case upon its merits.

PART 2. THE LIQUOR CONTROL COMMISSION IS NOT CLOTHED WITH AUTHORITY OR POWER TO MAKE AND INFORCE THE REGULATION COMPLAINED OF

On April 7, 1939, the defendant Liquor Control Commission made and published its purported regulation No. 20, which is in words and figures as follows:

"Governing Bottling of Beer and Regulation Size of Containers and Packages Used in the Distribution of Beer in the State of Utah.

Section 1. (a) No brewer, wholesaler, manufacturer or dealer shall import, cause to be imported or receive or resell any beer within the State of Utah, except in the original container as prepared for the market by the brewer at the place of manufacture.

(b) No brewer, dealer or wholesaler shall adopt or use in the State of Utah any container for beer differing in size from the following:

11 oz. of beer	whole barrels
12 " " "	half "
22 .. " "	quarter "
24 " " "	eighth "
32 " " "	
64 " " "	

Utah Liquor Control Commission
By J. W. Funk, Chairman
By Herbert Taylor, Commissioner
By Henry C. Jorgensen, Commissioner"

Thereafter plaintiff, in an effort to get relief from the Commission itself, requested a reconsideration and repeal of the order. In response to such request the matter was reconsidered, appearances were made and oral and written arguments presented. On November 16, 1939, the Commission recorded its decision not to disturb the order but to continue the same in full force and effect.

Plaintiff attacks the order as being beyond and in excess of the Commission's jurisdiction. The case is before the court upon plaintiff's complaint and defendant's general demurrer. All matter properly pleaded in plaintiff's complaint is confessed by the general demurrer. **Keyser v. Erickson,** 61 Utah 179, 211 Pac. 698. Resort will be had to the complaint for the facts which we contend are sufficient to require a ruling that the regulation complained of is void as being in excess of the Commission's power and jurisdiction.

Plaintiff is a brewing corporation of the State of Colorado and as such authorized and licensed to do business within the State of Utah as an importer and wholesaler of light beer. Plaintiff's beer is bottled in Colorado and sold in practically all of the states surrounding the State of Utah in 8 ounce bottles. Plaintiff has expended large sums of money in equipping itself to sell light beer in 8 ounce bottles and has developed throughout the territory served by it a large consumer demand for its beer in such containers.

Regulation No. 20, subparagraph (b), of which we complain, was adopted for the purpose of preventing plaintiff and others from selling light beers in 8 ounce bottles and from developing and acquiring a trade and business in such product. The regulation has been, is now, and will be enforced against plaintiff and others unless the enforcement is prohibited by this court. The enforcement of the regulation has done and will work an

irreparable damage to the business of plaintiff for which there can be no recovery and for which there is no remedy at law.

By the general demurrer it is admitted further that the regulation complained of is "arbitrary" and "discriminatory" and "bears no real or substantial relation to or does not promote or protect or tend to promote or protect the public health, morals, safety or welfare." Yet the defendant Commission will penalize violation thereof by a suspension of license or by fine or imprisonment or otherwise as in the Liquor Control Act provided.

Specifically it is admitted that by enforcement of the regulation "the loss to plaintiff of its respective investments, future profits and good will will be substantial, incalculable and said loss will not be recoverable by any action at law."

Admission of the facts pleaded forces the Commission to the position that however injurious to plaintiff the order may be; however arbitrary it may be and however unrelated it may be to public health, morals and safety, nevertheless, the Commission is clothed by the statute with such broad power that its jurisdiction in the matter is beyond successful challenge. This raises an issue of law which can, of course, find solution only by analysis of the Liquor Control Act.

It will be unnecessary to cite authority in support of the general proposition that all legislative authority resides in the legislature or that such power cannot be

delegated to any administrative board. True, if the legislature clearly defines the legislative purpose and provides well defined standards for carrying out such purpose then the legislature may safely and lawfully impose upon administrative boards certain powers which may appear to be legislative. But the standards must be clear beyond doubt so as to leave, in fact, only administrative functions to perform.

The power necessary to give validity to regulation No. 20 resides exclusively in the legislature and there is nothing in the statute which evidences any intention to delegate that power to the Commission.

An inspection of the statute will disclose that while for some purposes the legislature treats "liquor" and "light beer" together as alcoholic beverages, yet for nearly all purposes involving details of control they are treated as being different.

To begin with, the definition of "liquor" expressly excludes "light beer." No liquor can be purchased or consumed within the state (railroad service excluded) unless it be liquor both purchased and resold by the liquor commission. Every detail of the acquisition, storeing and sale of liquor is under control of the Commission and every cent of profit from the operation belongs to the state.

The legislature, it may be assumed for the purpose of argument, might have fixed by statute the size and type of containers in which liquor might be dispensed.

Because it had and has the power to prohibit the use of liquor at all it might fix the sizes in such measure as to effectively prevent the sale at all. But having conferred upon the Commission a monoply in the sale of liquor and having charged it with the responsibility of all details connected with the business it expressly conferred upon it the power of fixing by regulation the sizes of containers in which it would dispense liquor. We are not for the moment concerned with the question whether the legislature abdicated its legislative power in so doing. It is enough for the present that the legislature conferred no such power upon the Commission with respect of light beer.

By section 6 (i) of the statute it is provided:

> "(i) Determine the nature, form and capacity of all packages to be used for containing liquor kept or sold under this act."

The foregoing demonstrates that the legislature gave the details here involved careful consideration and was in command of language apt to express its intention. If there had been any legislative purpose to confer the power necessary to give validity to regulation No. 20, subsection (b) the legislature was not without the power to clearly express the intent and purpose. It would have been simple to link the words "and light beer" to the word "liquor" in the section quoted above or it could have substituted the words "alcoholic beverages" for the word "liquor."

Or in the sections of the statute dealing with light beer it could have employed language equivalent to that employed with relation to liquor. But it did no such thing. The legislature was apparently willing to bestow upon the Commission the power to determine the sizes of liquor containers, but as to beer containers the legislature conferred no such power. It determined to occupy that field itself. By section 96 it provided:

> "Section 96. Receipt, Sale and Possession of Untaxed Beer Unlawful.
>
> It shall be unlawful for any person to import, receive, possess, dispense, sell, give, offer for sale, deliver, distribute, ship, transport or store or in any manner use, either in the original package or otherwise, any beer unless the excise tax imposed by this act shall have been paid and unless a stamp or label showing such tax to have been paid shall be affixed to the barrel, bottle, or other immediate container of the beer; provided, that the commission may by regulation provide the conditions under which brewers licensed under this act may possess beer before the tax shall be paid thereon and the conditions under which they may export beer from the state without the payment of the tax. It shall be unlawful for any person to keep, sell, or otherwise dispose of any bottled beer in containers of a capacity of more than sixty-four fluid ounces, and shall be sold only in the original containers."

The foregoing being all that is said by the legisla-

ture upon the subject the only permissible inference is that beyond the restrictions there contained there are to be no further restrictions. If it be admitted for the moment that the legislature might have so encumbered the sale of beer by restrictions upon containers as to completely stifle such sale it by no means follows that the Commission has any such power. The sale of light beer is legalized expressly by the statute subject to certain regulation by the Commission. But the power to regulate as conferred by the statute is not the power to destroy. The power contended for by counsel in view of the admitted facts leads logically to the contention that the power of the Commission to regulate trade in beer is the power to prohibit entirely.

The legislature has said only that glass containers shall not exceed 64 ounces of beer in capacity. If within that maximum the Commission may arbitrarily control the size of containers it logically follows that it can prohibit entirely the sale of beer in bottles.

> "Where a line of business is to be supervised or controlled in whole or in part by a state agency (Fair Trades Commission of Utah) the legislative enactment should by clear and decisive words indicate the intent so to do, rather than to leave the power to depend on a judicial construction of doubtful words." **Paramor Theatre Co. v. Trade Commission et al.** 81 P. (2d) 639.

By rule 20 the Commission outlaws all bottle con-

tainers except 11, 12, 22, 24, 32 and 64 ounces. Tomorrow it may outlaw the very sizes favored to the exclusion of all others by regulation 20; and by regulation provide that light beer may be sold only in bottles of one-half ounce capacity. If upon the facts here admitted complaint of Regulation 20 is unavailing then a regulation limiting sales to bottles of one-half ounce capacity or any other size arbitrarily hit upon by the Commission would be invulnerable. That the Commission is clothed with some authority to make rules and regulations is not denied. Section 7 of the Act as amended provides:

> "The commission may, from time to time, make such resolutions, orders and regulations, **not inconsistent with this act,** as it may deem necessary for carrying out the provisions thereof and for its efficient administration. The commission shall cause such regulations to be filed in the office of the Secretary of State, and thereupon they shall have the same force as if they formed a part of this act. The commission may amend or repeal such regulations, and such amendments or repeals shall be filed in the same manner, and with like effect. The commission may from time to time cause such regulations to be printed for distribution in such manner as it may deem proper."

The words "not inconsistent with this act" become, we think, very important in construing the authority and jurisdiction of the commission to make or enforce any regulation.

This court said in Bird & Jex Co. v. Funk, 85 P. (2) 831 wherein this question was involved:

> 'It is a fundamental rule of statutory construction that the controlling purpose is to ascertain and give effect to the intention and purpose of the legislature. This intent and purpose is to be deduced from the whole and every part of the statute taken together. Roseberry v. Norsworthy 135 Miss. 845, 100 So. 514 * * In the exercise of the rule making power the commission must be guided by the intent and purpose of the legislature as found by a reading and interpretation of the whole act and every part thereof.''

The purpose of the act as stated in Section 2 is as follows:

> ''This act shall be deemed an exercise of the police powers of the State for the protection of the public health, peace and morals to prevent the recurrence of abuses associated with saloons to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages and all provisions of this act shall be liberally construed for the attainment of these purposes.

And its rule making powers as seen by a careful reading of Section 7 are limited to the regulations, orders and resolutions as it may deem necessary for carrying out the provisions thereof and for its efficient administration. In other words, it may not enlarge upon the express purposes of the legislature but may only make such

rules as to efficiently administer those expressed purposes.

Section 83 of the Act provides as follows:

> "Beer may be manufactured, sold, delivered, distributed, bottled, shipped or transported or removed for storage or consumption or sale within this state, or possessed or consumed therein or imported into or exported therefrom in the manner and under the conditions prescribed in this act, or in the regulations, and not otherwise."

The "condition prescribed by this act" must take precedence over any regulation made by the commission. It will be noted that beer is treated in the act under a separate article or chapter, being Article No. 5 and is expressly excluded from the definition of Liquor contained in Section 3 as follows:

> "Liquor" means and includes alcohol, or any alcoholic, spirituous, vinous, fermented, malt, or other liquid or combinations of liquids, a part of which is spirituous, vinous, or fermented and all other drinks or drinkable liquids, containing more than one-half of one per centum of alcohol by weight; and all mixtures, compounds or preparations, whether liquid or not, which contain more than one-half of one per centum of alcohol by weight, and which are capable of human consumption; **except that the term "liquor" shall not include "light beer."**
>
> "Alcoholic Beverage" means and includes

"Beer" and "liquor" as they are defined herein. Section 3, supra.

And in furtherance of that distinction between liquor and beer the legislature authorized the commission in Section 6 as follows:

> "Subject to the provisions of this act, the commission shall:
>
> (e) Control the possession, sale, transportation and delivery of alcoholic beverages in accordance with the provisions of this act and the regulations. * * *
>
> (i) Determine the nature, form and capacity of all packages to be used for containing liquor kept or sold under this act."

Sub-section (e) is the only provision in Section 6 referring to beer and Section 96 provides:

> "It shall be unlawful for any person to import receive, possess, dispense, sell, give, offer for sale, deliver, distribute, ship, transport or store or in any manner use, either in the original package or otherwise, any beer unless the excise tax imposed by this act shall have been paid and unless a stamp or label showing such tax to have been paid shall be affixed to the barrel, bottle, or other immediate container of the beer; proveded that the commission may by regulation provide the conditions under which brewers licensed under this act may possess beer BEFORE THE TAX SHALL BE PAID THEREON AND THE CONDITIONS UNDER WHICH THEY MAY EXPORT BEER FROM THE STATE WITH-

OUT THE PAYMENT OF THE TAX. It shall be unlawful for any person to keep, sell or otherwise dispose of any bottled beer in containers of a capacity of more than sixty-four fluid ounces, and shall be sold only in the original containers."

This Honorable Court said in Bird & Jex v. Funk, supra:

"The declared general purposes of the Liquor Control Act, under which the Liquor Commission derives its authority are "for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages * * *"

And this court further said:

"Where the legislature delegates to an administrative agency power to make rules and regulations, such delegation must be accompanied by a declared policy outlining the field within which such rules and regulations may be adopted." Citing Schechter Poultry Corp. v. U. S., 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446; State v. Goss, 79, Ut. 559, 11 P (2) 340. From this it must necessarily follow that all rules and regulations adopted by an administrative board or agency must be in furtherance of and follow out the declared policies of the legislative enactment. If the regulations or rules are in excess

of the declared purposes of the statute they are invalid." State v. Goss, supra, Utah Manufacturers Assn. v. Stewart, 82 Utah 198 23 P. (2) 229.

That the Legislature originally gave the Commission broad powers is not denied. But that they did not intend to give (even if that were possible which we submit was not) complete and arbitrary power on the part of the Commission to regulate the sale of light beer or to prohibit the same is evidenced by Section 29, Chapter 43, Laws of Utah 1935 which reads as follows:

> "Every action, order or decision of the Commission as to any matter or thing in respect of which any discretion is conferred on the Commission under this act shall be final and shall not be questioned, reviewed or restrained by injunction, prohibition or mandamus or other process or proceeding in any court or be removed by certiorari or otherwise to any court EXCEPT IN THE CASES IN WHICH FRAUD OR EXCESS OF JURISDIC TION IS CLAIMED."

But even from the powers and authority granted the Commission by the 1935 Act there was withdrawn in Chapter 49, Laws of Utah, 1937 the power to grant licenses to sell light beer at retail and on draught and giving that power to the cities and towns. Section 89, Chapter 50, Laws of Utah 1937. In Section 103 the act provides for tax stamps to be affixed for containers of capacity other than the capacities mentioned in the act and provides:

> "And if stamps are not provided by law or in the discretion of the Tax Commission of denominations accurately adapted for the payment of the tax on the maximum capacity of the container then the stamp adapted for the payment of the tax on the container of the next higher capacity."

recognizing the right to sell beer in containers of any capacity under 64 fluid oz. so long as the tax was paid. Section 104 as amended in Chapter 50, Laws of Utah 1937 provides for labels, caps and stamps to be used on containers without restriction as to capacity. We may all disagree as to the advisability of the Legislature restricting the powers of the commission over the control of light beer, but as Justice Wolfe stated in his dissenting opinion in the case of Bird & Jex Co. v. Funk, 85 Pac. (2) at page 837,

> "If the legislature detracted from the salutary purposes of the act it must stand responsible to the people. The courts cannot by forced construction serve those purposes to the people against the expressed will of the legislature."

Having in mind that the legislature contented itself upon the subject of size and capacity of bottles by prohibiting the use of bottles of more than 64 ounces a reading of **Tite v. Tax** Commission, supra, will make it clear that the order now complained of is void. In the Tite case this court reviewed a tax statute which provided that for violation of certain provisions a person became subject to a fine of not more than $299.00 or less than

$10.00. The Tax Commission, being charged with the administration of the law, found a violation and assessed a fine of $250.00. This court condemned the assessment of the fine and in the course of its opinion said:

> "In this case, the Legislature gave the tax commission not only power to hear and determine whether a penalty should attach, but within the limits of from $10 to $299 to fix the penalty. The commission fixed it at $250. This involved not only the function of determining whether a situation was such as would work an imposition of the penalty fixed or ascertainable by law and the function of imposing such penalty, but the function and power of determining the amount of the penalty. This involves not the question of whether the Legislature gave the taxe commission a judicial rather than an administrative power (unless we accept the plaintiffs' contention that this power to determine the amount of the penalty is really fixing punishment for a crime), but the question of whether the Legislature could delegate such power to determine the amount, in its discretion, to any tribunal as a matter of penalty imposed not as punishment for a crime but as a sanction to pay the tax. We think it could not do so. Giving to the tax commission the power to determine in its own judgment the amount of the penalty was a legislative function which could not be delegated. It is not the power to enforce or apply a law, but the power to make a law for each particular case, to determine in its

judgment the amount of a penalty. We recognize the power to make reasonable rules and regulations and to make a failure to obey them involve a loss of rights either given by law or by the regulations themselves. But in this case there was no basis provided for the commission to ascertain the amount of the penalty by a mathematical computation, but the broad power to determine its amount within its discretion, from $10 up to $299."

Here the legislature has said it shall be unlawful to employ bottle containers of more than 64 ounces. The Commission has passed a law that a crime is committed when an eight ounce bottle is used. If the assessment of a fine by the Tax Commission at a sum between $10.00 and $299.00 was making a law then most certainly the Liquor Commission was making a law when it declared it to be a public offense to sell beer in 8 ounce bottles.

If the Commission may pass a law forbidding the purchase or sale of light beer in 8 ounce bottles there is nothing in the way of its declaring it unlawful for a dispenser of beer to draw less than eleven ounces of beer into a glass to serve his customer. A step further in the same direction leads to the inquiry whether if a customer can purchase no less than eleven ounces of beer he shall be required to consume all he buys. If a customer can buy as much or little beer as he desires from a tap why must he be forced to buy more than he wants in a bottle.

SUMMARY

From what has been set down before it has been

made clear that this court has jurisdiction to hear this matter upon its merits and to determine and adjudge the rights of the parties. Possessing the necessary jurisdiction the court will exercise the same whenever necessary to provide that plain, speedy and adequate remedy which is the right of all persons whose rights are invaded or threatened with invasion.

The case involves the exercise by an administrative board of challenged powers and this court, recognizing the advantage to the public of an early settlement of such disputes, has rarely declined jurisdiction in such cases. It is in the public interest to have disputes testing the powers of administrative bodies quickly and finally settled.

Furthermore, it is admitted here that plaintiff is possessed of substantial rights which are invaded by the enforcement of the order complained of; and that there can be no recourse for the damage suffered by such invasion if finally it shall be ruled that the regulation is void. The order admittedly does not promote the health, safety or morals of the public but it is claimed that the Commission has the power to make and enforce the regulation throughout the State. The situation not only justifies but invites the assumption and exercise of jurisdiction.

Upon the merits of the case it will appear that the Commission has invaded a field never opened to it by the legislature. It has assumed, without relation to the

declared purposes of the act, the power and authority to legislate upon the size and capacity of light beer containers. If such power be confirmed in the Commission it will be at liberty to convert the power of regulation into the power of prohibition. If the Commission can outlaw the sale of beer in an 8 ounce bottle it may outlaw the sale of beer in any bottle at all and thereby suspend and prohibit a trade and business expressly legalized by the legislature. Certainly there is nothing in the statutes from which any such power may be implied.

To the end that the plaintiff may enjoy that plain, speedy and adequate remedy to which it is entitled it is respectfully submitted that the court should take jurisdiction of the controversy and upon a review of the order it should declare the same to be void and of no effect.

Respectfully submitted

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